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**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

AVERY CHURCH, JR.,

Petitioner,

vs.

FILSON, *et al.*,

Respondents.

Case No. 3:17-cv-00004-HDM-WGC

ORDER

This action is a *pro se* petition for a writ of habeas corpus filed pursuant to 28 U.S.C. § 2254 by a Nevada state prisoner.

The petition in the instant action challenges petitioner's 2006 state conviction for robbery with the use of a deadly weapon and impersonating a police officer in the Eighth Judicial District Court for the State of Nevada (Case No. C221905). Petitioner previously challenged the same convictions in this Court, in a federal habeas petition filed under case number 3:11-cv-00904-RCJ-VPC. The petition in case number 3:11-cv-00904-RCJ-VPC, which raised the same issues asserted in the instant petition, was dismissed as untimely by order filed March 7, 2013. (ECF No. 17 in 3:11-cv-00904-RCJ-VPC). Judgment was entered on March 8, 2013. (ECF No. 18 in 3:11-cv-00904-RCJ-VPC). Petitioner appealed. By order filed July 25, 2013, the United States Court of Appeals for the Ninth Circuit denied petitioner's application for a certificate of appealability. (ECF No. 25 in 3:11-cv-00904-RCJ-VPC).

1 “Before a second or successive application permitted by this section is filed in the district
2 court, the applicant shall move in the appropriate court of appeals for an order authorizing the
3 district court to consider the application.” 28 U.S.C. § 2244(b)(3)(A). Pursuant to 28 U.S.C. §
4 2244(b)(1), “[a] claim presented in a second or successive habeas corpus application under section
5 2254 that was presented in a prior petition shall be dismissed.” In the prior habeas case in which
6 petitioner challenged the same convictions challenged in the instant case, the Court dismissed the
7 petition with prejudice as untimely. (ECF No. 17 in 3:11-cv-00904-RCJ-VPC). Where a petition
8 is dismissed with prejudice as untimely, the dismissal constitutes a disposition on the merits and
9 renders a subsequent petition successive for purposes of 28 U.S.C. § 2244(b). *McNabb v. Yates*,
10 576 F.3d 1028, 1029-30 (9th Cir. 2009); *Henderson v. Lampert*, 396 F.3d 1049, 1053 (9th Cir. 2005).
11 The prior habeas corpus petition was dismissed with prejudice as untimely, and the instant habeas
12 petition asserts the same claims as the prior petition. The instant petition is a successive petition,
13 which requires petitioner to seek and obtain leave of the Ninth Circuit Court of Appeal to pursue.
14 See 28 U.S.C. § 2244(b)(3) *et seq.* Petitioner has not presented this Court with proof that he has
15 obtained leave to file a successive petition from the Ninth Circuit Court of Appeals. Therefore, the
16 instant petition will be dismissed as successive.

17 In order to proceed with any appeal, petitioner must receive a certificate of appealability.
18 28 U.S.C. § 2253(c)(1); Fed. R. App. P. 22; 9th Cir. R. 22-1; *Allen v. Ornoski*, 435 F.3d 946, 950-
19 951 (9th Cir. 2006); *see also United States v. Mikels*, 236 F.3d 550, 551-52 (9th Cir. 2001). District
20 courts are required to rule on the certificate of appealability in the order disposing of a proceeding
21 adversely to the petitioner or movant, rather than waiting for a notice of appeal and request for
22 certificate of appealability to be filed. Rule 11(a) of the Rules Governing Section 2254 and 2255
23 Cases. Generally, a petitioner must make “a substantial showing of the denial of a constitutional
24 right” to warrant a certificate of appealability. 28 U.S.C. § 2253(c)(2); *Slack v. McDaniel*, 529 U.S.
25 473, 483-84 (2000). “The petitioner must demonstrate that reasonable jurists would find the district
26 court's assessment of the constitutional claims debatable or wrong.” *Id.* (*quoting Slack*, 529 U.S. at
27 484). In order to meet this threshold inquiry, the petitioner has the burden of demonstrating that the
28 issues are debatable among jurists of reason; that a court could resolve the issues differently; or that

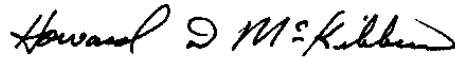
1 the questions are adequate to deserve encouragement to proceed further. *Id.* In this case, no
2 reasonable jurist would find this Court's dismissal of the petition debatable or wrong. The Court
3 therefore denies petitioner a certificate of appealability.

4 **IT IS THEREFORE ORDERED** that this action is **DISMISSED WITHOUT**
5 **PREJUDICE** as a successive petition.

6 **IT IS FURTHER ORDERED** that petitioner is **DENIED A CERTIFICATE OF**
7 **APPEALABILITY.**

8 **IT IS FURTHER ORDERED** that the Clerk **SHALL ENTER JUDGMENT** accordingly.

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10 Dated this 2nd day of June, 2017.

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13 HOWARD D. McKIBBEN
14 UNITED STATES DISTRICT JUDGE
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